

OCT 24 2007

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Application No.: 10/025,059

Inventor(s): Patricia Lee Christon et al.

Filed: December 19, 2001

Docket No.: 8819

Confirmation No.: 6014

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- 1) Appeal Brief (14 pages)
- 2) Amendment After Final Office Action (4 pages)

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OCT 24 2007**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Application No. : 10/025,059
Inventor(s) : Patricia Lee Christon et al.
Filed : December 19, 2001
Art Unit : 3761
Examiner : Michele M. Kidwell
Docket No. : 8819
Confirmation No. : 6014
Customer No. : 27752
Title : ABSORBENT ARTICLE

APPEAL BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

This Brief is filed pursuant to the appeal from the decision communicated in the Office Action mailed on May 25, 2007.

A timely Notice of Appeal was filed on August 24, 2007.

REAL PARTY IN INTEREST

The real party in interest is The Procter & Gamble Company of Cincinnati, Ohio.

RELATED APPEALS AND INTERFERENCES

There are no known related appeals, interferences, or judicial proceedings.

STATUS OF CLAIMS

Claims 1-17 and 19 are rejected.

Claims 2-3, 10-13, 15-17, and 19 have been cancelled.

Claims 1, 4-9, and 14 are pending and appealed.

A complete copy of the appealed claims is set forth in the Claims Appendix attached herein.

STATUS OF AMENDMENTS

An amendment cancelling Claims 2-3, 10-13, 15-17, and 19 and correcting dependency and a typographical error in Claim 4 was filed on October 24, 2007,

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concurrent with the filing of this Appeal Brief. The amendment has not been acted upon by the Examiner at this time.

SUMMARY OF CLAIMED SUBJECT MATTER

Claim 1 relates to an absorbent article having an upper surface, a lower surface and a periphery, comprising: a topsheet having a bottom surface and a viewing surface positioned opposite to the bottom surface, the viewing surface facing upwardly towards the upper surface of the absorbent article; a backsheet having a garment facing surface and a user facing surface positioned oppositely to the garment facing surface, the backsheet being joined to the topsheet; an absorbent core having a top surface and a bottom surface positioned opposite to the top surface, the absorbent core being positioned between the topsheet and the backsheet; and the absorbent article having a colored portion and a non-colored portion, the colored portion and the non-colored portion being viewable from the viewing surface of the topsheet, the colored portion having a first shade and a second shade, the first shade being positioned substantially within the second shade, the second shade being different from the first shade, the shades operating to create a perception of depth within the absorbent article by a user looking upon the viewing surface of the topsheet (*See, e.g.*, specification page 6, line 15 to page 7, line 4).

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

Claims 1 and 9-17 stand rejected under 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 5,897,541 issued to Uitenbroek et al.

Claims 2-8 and 19 stand rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 5,897,541 issued to Uitenbroek et al.

ARGUMENTS

- I. **The Final Office Action has failed to establish a prima facie case supporting the rejection of Claims 1 and 9-17 under 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 5,897,541 issued to Uitenbroek et al. ("Uitenbroek")**

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Claims 1 and 9-17 have been rejected under 35 U.S.C. §102(b) as being anticipated by Uitenbroek et al., U.S. 5,897,541 (hereinafter "Uitenbroek"). Claims 10-13 and 15-17 have been cancelled. Applicants respectfully traverse this rejection because the Office Action has failed to set forth a *prima facie* case of anticipation. "A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 51053 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 827 (1987); M.P.E.P. 2131. In addition, the Federal Circuit has stated that the claim elements must be described with sufficient precision and detail to establish that the subject matter existed in the prior art. *Verve, LLC v. Crane Cams, Inc.*, 311 F.3d 1116, 1120, 65 USPQ2d 1051 (Fed. Cir. 2002) ("A single reference must describe the claimed invention with sufficient precision and detail to establish that the subject matter existed in the prior art."). As shown below, the Office Action has not shown how Uitenbroek meets the requirements of the standard for anticipation. Furthermore, the Office Action has not shown how Uitenbroek discloses the claimed invention with any precision, much less sufficient precision so as to place the subject matter in the prior art.

The claimed invention is directed to an absorbent article having a colored portion and a non-colored portion, the colored portion and the non-colored portion being viewable from the viewing surface of the topsheet, the colored portion having a first shade positioned substantially within a second shade, the second shade being different from the first shade, the shades operating to create a perception of depth within the absorbent article by a user looking upon the viewing surface of the topsheet. Applicants respectfully submit that the Office Action has not shown where Uitenbroek teaches every limitation of the claimed invention, as set forth below. Specifically, the Office Action has not shown where Uitenbroek discloses an absorbent article having 1) *a colored portion and a non-colored portion*, the colored portion and the non-colored portion being viewable from the viewing surface of the topsheet, *the colored portion having a first shade and a second shade*, and 2) *the first shade being positioned substantially within the*

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second shade, and 3) the shades operating to create a perception of depth within the absorbent article by a user looking upon the viewing surface of the topsheet.

A. The Final Office Action has not shown where Uitenbroek teaches an absorbent article having a colored portion and a non-colored portion, the colored portion and the non-colored portion being viewable from the viewing surface of the topsheet, the colored portion having a first shade and a second shade.

In order to present a *prima facie* case of anticipation, the Office Action must show where Uitenbroek teaches an absorbent article having a non-colored portion and a colored portion having a first shade and a second shade with sufficient precision. Applicants respectfully submit that the Office Action has failed to meet this burden.

The Office Action cites to Uitenbroek at Col. 1, lines 63-65, as showing a colored portion and a non-colored portion being viewable from the viewing surface of the topsheet. (Office Action, page 2). Col. 1, lines 63-65, of Uitenbroek reads as follows:

The laminate material comprises a first layer of material having opaque areas, transparent areas and a coloration.

Applicants have reviewed the citation and respectfully submit that they do not find where in Col. 1, lines 63-65, Uitenbroek teaches or suggests the claimed invention. Uitenbroek states that "the transparent areas present in the first layer of material are generally provided by physical treatment of areas of an opaque first layer of material to render said areas transparent." Col. 3, lines 21-24. Specific examples provided in Uitenbroek include a first layer that has a coloration in the opaque areas and that is colorless in the transparent areas. Col. 4, lines 53-55. Other examples include a colored first layer that is heated to form transparent areas. *See, e.g.,* Examples 1 and 2, and Claims 39 and 40. The Office Action does not indicate which portion of the first layer of material referenced

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in Col. 1, lines 63-65, of Uitenbroek corresponds to the non-colored portion, the first shade of the colored portion, or the second shade of the colored portion. As such, Applicants do not see how Col. 1, lines 63-65, of Uitenbroek teaches an absorbent article having a colored portion and a non-colored portion, the colored portion and the non-colored portion being viewable from the viewing surface of the topsheet, the colored portion having a first shade and a second shade.

Furthermore, the Office Action has not shown where Uitenborek teaches an absorbent article having a non-colored portion. Although the Office Action argues that "limitations from the specification are not read into the claims" (Office Action, page 8), Applicants are free to be their own lexicographers. *See, e.g.,* M.P.E.P. 2111.01. Applicants define "non-colored" in the Specification, at, *e.g.,* page 5, lines 25-27, as "colors having an L* value of at least 90, an a* value equal to 0 ± 2 , and a b* value equal to 0 ± 2 ." The Office Action has not presented any evidence that the laminate of Uitenbroek would meet the definition of "non-colored" as claimed by Applicants. As such, the Office Action has not indicated where Uitenbroek teaches each and every element of the claimed invention, such as, *e.g.,* an absorbent article having a non-colored portion, much less where Uitenbroek shows such elements with sufficient precision for anticipation.

B. The Final Office Action has not shown where Uitenbroek teaches an absorbent article having a colored portion and a non-colored portion, the colored portion having a first shade and a second shade, *the first shade being positioned substantially within the second shade.*

Applicants respectfully submit that the Office Action has not shown where Uitenbroek teaches an absorbent article having a colored portion and a non-colored portion, the colored portion having a first shade and a second shade, the first shade being positioned substantially within the second shade.

The Office Action cites to Column 1, lines 35-44, and Figure 1 of Uitenbroek as teaching a "colored portion having a first shade and a second shade, the first shade being

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positioned substantially within the second shade, the second shade being different from the first shade.” (Office Action, pages 2-3). Column 1, lines 35-44 of Uitenbroek states:

The laminate material comprises a first layer of material having opaque areas, transparent areas and a coloration. The laminate further comprises a second layer of material adjacent said first layer of material. The second layer of material has a different coloration than said first layer of material, whereby the coloration of said second layer of material is visible through said transparent areas of said first layer of material to a greater extent than through said opaque areas of said first layer of material.

Applicants have reviewed the citation and respectfully submit that the Office Action has not pointed to which elements in Uitenbroek teach an absorbent article having a colored portion and a non-colored portion, the colored portion having a first shade and a second shade, the first shade being positioned substantially within the second shade as claimed by Applicants. As discussed above, the Office Action does not show where Uitenbroek teaches an absorbent article having a colored portion and a non-colored portion, the colored portion having a first shade and a second shade. The Office Action further fails to explain how Uitenbroek teaches the first shade being positioned substantially within the second shade. As such, the Office Action has not shown where Uitenbroek includes each and every element of the claimed invention, such as, *e.g.*, the first shade being positioned substantially within the second shade, much less where Uitenbroek teaches such elements with sufficient precision for anticipation.

C. The Final Office Action has not shown where Uitenbroek teaches an absorbent article having a colored portion and a non-colored portion, the colored portion having a first shade and a second shade, the first shade being positioned substantially within the second shade, the second shade being different from the first shade, *the shades operating to create a perception of depth within the absorbent article by a user looking upon the viewing surface of the topsheet.*

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Applicants further submit that the Office Action has not shown where Uitenbroek teaches a first shade and a second shade operating to create a perception of depth within the absorbent article by a user looking upon the viewing surface of the topsheet. Uitenbroek states that it is desirable to have indicia such as lettering or figures appear on the exterior surfaces of absorbent articles such as disposable diapers, training pants, adult incontinence products, feminine care products and the like; however, Uitenbroek notes that it can be difficult to print on the many films and non-wovens that typically make up the outer layers of such products. Uitenbroek's stated goal is to provide an alternative method of providing printing on such materials. The Office Action points to Column 1 lines 35-44, and Figure 1 of Uitenbroek as supporting the assertion that Uitenbroek discloses claim elements including perception of depth. Applicants have reviewed the citation and respectfully submit that they do not see where the selected disclosure or the Figure in Uitenbroek suggests either the existence of a first shade and a second shade operating to create a perception of depth, or the benefit or desirability of a first shade and a second shade operating to create a perception of depth, much less anything of the sort with sufficient precision for anticipation.

D. Conclusion

The Office Action has not shown where Uitenbroek discloses each and every element of Claim 1 and its dependent Claims 9 and 14, and, therefore, has failed to present a *prima facie* case of anticipation with regards to Claims 1, 9, and 14. As such, Applicants contend that the claimed invention is novel in view of Uitenbroek and that the rejection should be withdrawn.

II. The Final Office Action has failed to establish a prima facie case supporting the rejection of claims 2-8 and 19 under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 5,897,541 issued to Uitenbroek et al.

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Claims 2-8 and 19 have been rejected under 35 U.S.C. §103 as being unpatentable over Uitenbroek. Claims 2-3 and 19 have been cancelled. Applicants respectfully traverse this rejection, as the Office Action has not shown where Uitenbroek teaches or suggest all of the claim limitations of the present invention, as required by MPEP 2143.03. As such, the Office Action has not established a *prima facie* case of obviousness.

To establish *prima facie* obviousness of the claimed invention, all the claim limitations must be taught or suggested by the prior art. *In re Royka*, 490 F.2d 981, 180 U.S.P.Q. 580 (CCPA 1974). Furthermore, as set out in MPEP 608.01(i)(c) "Claims in dependent form shall be construed to include all the limitations of the claim incorporated by reference into the dependent claim." Additionally, "Examiners are reminded that a dependent claim is directed to a combination including everything recited in the base claim and what is recited in the dependent claim. It is this combination that must be compared with the prior art, exactly as if it were presented as one independent claim." *See, e.g.*, MPEP 608.01(n)

Claims 4-8 depend from Claim 1. Therefore, Claims 4-8 are directed to embodiments including an absorbent article having a colored portion and a non-colored portion, the colored portion and the non-colored portion being viewable from the viewing surface of the topsheet, the colored portion having a first shade and a second shade, the first shade being positioned substantially within the second shade, the second shade being different from the first shade, the shades operating to create a perception of depth within the absorbent article by a user looking upon the viewing surface of the topsheet. As discussed above in connection with the current §102 rejection, the Office Action has not shown where Uitenbroek teaches or suggests each and every claim limitation, such as, *e.g.*, an absorbent article having 1) *a colored portion and a non-colored portion*, the colored portion and the non-colored portion being viewable from the viewing surface of the topsheet, *the colored portion having a first shade and a second shade*, and 2) *the first shade being positioned substantially within the second shade*, and 3) *the shades operating to create a perception of depth within the absorbent article* by a user looking upon the viewing surface of the topsheet.

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In addition, the Office Action has not provided evidence of any motivation to provide an absorbent article having a colored portion and a non-colored portion, where the colored portion is viewable from the viewing surface of the topsheet, and the colored portion has a first shade and a second shade, the first shade being positioned substantially within the second shade, the second shade being different from the first shade, the shades operating to create a perception of depth within the absorbent article. Furthermore, the Office Action is basing its arguments on impermissible hindsight and improper use of the teachings of Applicants' own specification. Finally, even assuming Uitenbroek properly could be modified to provide the limitations of Claims 4-8, the claimed invention would not result, as any modification of Uitenbroek fails to include, for example, a colored portion and a non-colored portion, the colored portion and the non-colored portion being viewable from the viewing surface of the topsheet, the colored portion having a first shade and a second shade, the first shade being positioned substantially within the second shade, the shades operating to create a perception of depth by a user looking upon the viewing surface of the topsheet.

Regarding Claims 4-7, the Office Action argues that "the prior art structure is capable of performing the intended use." (Office Action, page 5). Applicants respectfully submit that the Office Action has not set forth any evidence regarding the capabilities of the prior art for performing the intended use. As set forth above, the Office Action has not shown where Uitenbroek teaches or suggests each and every element of the claimed invention. As such, Applicants do not see how the structure of Uitenbroek meets the elements of Claims 4-7.

Regarding Claim 8, the Office Action states that discovering the optimum range of the size of the colored portion in respect to the viewing surface of the topsheet involves only a level of ordinary skill in the art. (Office Action, page 5). Applicants respectfully submit that the Office Action has failed to present any evidence that the size of the colored portion is a "result-effective variable." ("A particular parameter must first be recognized as a result-effective variable, i.e., a variable which achieves a recognized result, before the determination of the optimum or workable ranges of said variable might be characterized as routine experimentation." M.P.E.P. 2114.05). The Office Action has

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also failed to provide any evidence showing a motivation to optimize the size of the color portion. As set forth above, the Office Action has not shown where Uitenbroek teaches or suggests each and every element of the claimed invention. Thus, even if Uitenbroek could be modified in the manner described by the Office Action, the Office Action has not shown how the claimed invention would result.

Accordingly, because the Office Action fails to make a *prima facie* case of obviousness in accordance with M.P.E.P. 2143, Applicants respectfully request that the rejection be withdrawn and Claims 4-8 be allowed.

SUMMARY

In view of all of the above, it is respectfully submitted that the aforementioned rejections are erroneous. The Board's reversal of the rejections is respectfully requested.

Respectfully submitted,

THE PROCTER & GAMBLE COMPANY



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CLAIMS APPENDIX

1. An absorbent article having an upper surface, a lower surface and a periphery, comprising:
a topsheet having a bottom surface and a viewing surface positioned opposite to the bottom surface, the viewing surface facing upwardly towards the upper surface of the absorbent article;
a backsheet having a garment facing surface and a user facing surface positioned oppositely to the garment facing surface, the backsheet being joined to the topsheet;
an absorbent core having a top surface and a bottom surface positioned opposite to the top surface, the absorbent core being positioned between the topsheet and the backsheet; and
the absorbent article having a colored portion and a non-colored portion, the colored portion and the non-colored portion being viewable from the viewing surface of the topsheet, the colored portion having a first shade and a second shade, the first shade being positioned substantially within the second shade, the second shade being different from the first shade, the shades operating to create a perception of depth within the absorbent article by a user looking upon the viewing surface of the topsheet.
4. The absorbent article of Claim 1 wherein the color differences between the colored portion and the non-colored portion are measured at a first point, a second point, and a third point on the viewing surface of the topsheet inboard of the periphery of the absorbent article, the first point being measured within the first shade, the second point being measured within the second shade, and the third point being measured within the non-colored portion of the absorbent article, the color differences being calculated using the L, a, and b values by the formula $\Delta E^* = [(L^*_x - L^*_y)^2 + (a^*_x - a^*_y)^2 + (b^*_x - b^*_y)^2]^{1/2}$.
5. The absorbent article of Claim 4 wherein the difference in color between the first shade and the second shade is at least 3.5.

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6. The absorbent article of Claim 4 wherein the difference in color between the first shade and the non-colored portion is at least 6.
7. The absorbent article of Claim 4 wherein the difference in color between the second shade and the non-colored portion is at least 3.5.
8. The absorbent article of Claim 1 wherein the size of the colored portion ranges from about 5% to about 98% of the viewing surface of the topsheet.
9. The absorbent article of Claim 1 wherein the first shade of the colored portion is positioned substantially centrally in relation to the second shade of the colored portion.
14. The absorbent article of Claim 1 wherein the colored portion comprises a multi-colored insert positioned beneath the topsheet and comprising at least a first layer and a second layer wherein the first layer comprises one shade of the color and wherein the second layer comprises another shade of the color.

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EVIDENCE APPENDIX

None.

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RELATED PROCEEDINGS APPENDIX

None.